IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/12/2002

CORAM

THE HONOURABLE MR.JUSTICE P.SHANMUGAM
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.1122 of 1986
and
Transfer A.S.No.437 of 1989

A.S.No.1122 of 1986:

1. G.Ramaraj
2. Syamala
3. Rajaguru
4. Rajagopal .. Appellants

-Vs-

1. Ponnuchamy Reddiar
2. Gnanammal
3. Durairaj
4. Saraswathi Ammal
5. Gunapal
6. Gandhiraj
7. Dinakaran .. Respondents

Tr.A.S.No.437 of 1989

Shyamala .. Appellant

vs

1. Nannammal
2. Ponnusamy Reddiar
3. Durairaj Reddiar
4. Kunabalan
5. Ghandhiraj
6. Dinakaran .. Respondents

These two appeal suits are preferred under Order 41 Rule 1 and S.96 of The Code of Civil Procedure against the common judgment and decree of the learned II Additional Subordinate Judge, Madurai in O.S.Nos.3 63/81 and 59/85 dated 28.8.1986.

!For Appellants : Mr.T.Srinivasa Raghavan

^For Respondents : Mr.M.V.Venkataseshan
for RR1, 3 to 6 and
proposed parties (RR8 to 11)
and for all Respondents in
Tr.A.S.437/89

R2 and R7 died

:COMMON JUDGMENT

M.CHOCKALINGAM, J.
The defendants 3 to 6 in O.S.363/81 are the appellants in A.S.1122/8
6, while the plaintiff in O.S.59/85 is the appellant in A.S.437/89.
2. Both the appeals have arisen from the common judgment and decree
of the learned II Additional Subordinate Judge, Madurai, granting a
preliminary decree in O.S.363/81 and dismissing the suit in O.S.59/85.
3. The plaintiff in O.S.363/81 has averred in the plaint as follows:
The plaintiff is the son of the defendants 1 and 2 and the brother of
the defendants 3 and 7, while the defendants 4 to 6 are the children of the
third defendant. Suit properties are the ancestral properties of the
plaintiff, and some of them are purchased out of the income from the joint
family properties and the defendants 1, 3 and 7. The properties described in
'A' Schedule are ancestral properties. 'B' Schedule properties were purchased
in the name of the first defendant . Since the name of the second defendant
is lucky, 'C' Schedule properties were purchased in her name. She is only a
benami. 'D' Schedule properties were purchased in the name of the plaintiff.
'B' to 'D' Schedule properties were purchased from out of the income from the
ancestral properties and from the joint efforts of the plaintiff and the
defendants 1, 3 and 7. 'E' Schedule properties are in the house in
Maiyittampatty Village, while 'F' Schedule properties are in the house in
Madukathan Village. Though heavy amounts of the joint family in cash have
been deposited in the names of the defendants 4, 5 and 6, they have no
independent source of income. Hence, those deposits belonged to the joint
family. The defendants 1 and 3 have also advanced loans to various parties to
the tune of Rs.80,000/- from the joint family funds. The first defendant as
kartha of the joint family is liable to render accounts for the same. The 8th
defendant is the daughter and the 9th defendant is the son of the plaintiff,
while the defendants 10 and 11 are the sons of the 7th defendant. The 9th
defendant purchased 37 cents of punja lands from out of the funds provided by
his mother by way of a registered sale deed dated 7.7.66. the said properties
are not the joint family properties. The plaintiff and the defendants 1, 3
and 7 are entitled to 1/4th share in the suit properties. The 2nd defendant
is entitled to only maintenance till her life from out of the share of the
first defendant. Since quarrel arose in the family, the plaintiff tried his
level best to have a partition of the joint family properties. On 5.6.81, the
first defendant informed that there cannot be any partition, which constrained
the plaintiff to file this suit for partition and allotment of 1/4th share of
the suit properties to the plaintiff and for direction to the first defendant
to render accounts.

4. The defendants 1 and 3 to 6 have filed a written statement with

the following averments:
'C' Schedule properties belonged to the second defendant, having been acquired by her from out of her sridhana properties. Apart from that, the house property bearing door No.70.A in Maiyittampatty Village described in B Schedule belonged to the 2nd defendant, and it is purchased by her with her own funds. In addition to the properties described in A Schedule, the family is entitled to a padapadi 2 cents in extent comprised in R.S.97/14 in the Village of Maiyittampatty, which should be included as an item available for division. The kottam described in B Schedule is only a repetition of item 16 of A Schedule, and hence, item 16 of A schedule should be deleted. Since the first defendant had become ill and old in 1971, he entrusted the management of the properties to the plaintiff. The fact that the amount of Rs.12,000/- belonging to the family was deposited in the name of the minor son of the plaintiff as a lucky name in the Indian Bank, Viruidhunagar Branch was suppressed by the plaintiff. The said amount should also be included as an item available for division. The minor son of the plaintiff had no wherewithal to purchase any property, and hence, the properties under items 1 to 5 were purchased out of the joint family income. Out of the income from the joint hindu family, the plaintiff advanced Rs.30,000/- on othi in the name of his daughter Saraswathi, and the plaintiff subsequently purchased the said house in her name for a consideration of Rs.1,30,000/-. The plaintiff has also obtained another othi for Rs.10,000/- in her name. But, the plaintiff has fraudulently omitted to include the said property for division. The plaintiff's son and daughter should also be impleaded as parties. The suit is bad for their non joinder. The plaintiff has also omitted to mention the various vessels and other movables. Since they are family properties, they should also be made available for partition. There are two wooden bureaus. There are only two pairs of bulls. The value given for items 1 and 3 to 9 of E Schedule is not correct. Items 2 and 9 of E Schedule do not belong to the family, but belonged to the 2nd defendant. The plaintiff has deliberately omitted to mention 2 bearing machines belonging to the family, which are in his custody. They should also be made available for partition. The house in Madakathan Village belonged to the 2nd defendant. Though these defendants are always ready and willing to effect a fair and equitable partition, the plaintiff and the 7th defendant colluded with each other and are adopting unreasonable attitude by setting up false claims to the properties which exclusively belonged to the 2nd defendant. These defendants have no objection for dividing the ancestral properties. None of the family properties or funds are with either the first defendant or the third defendant, and they are not liable to render any account therefor. The suit is also bad for non joinder of two sons of the 7th defendant. Hence, a preliminary decree may be passed in respect of the family properties only belonging to the plaintiff and the defendants 1 and 3 to 6 allotting their 1/4th share separately, and the plaintiff has to be directed to render accounts in respect of their respective shares and pay the same to them. The remaining portion of the suit claim may be dismissed with costs.
5. The second defendant filed a written statement alleging that with the moneys presented to her, she had been advancing the same to various persons for interest even as early as 1929; that the moneys advanced by her from 1929 refer only to her separate funds and not out of the joint family funds; that she purchased properties with her moneys, in which neither the

first defendant nor the joint Hindu family of the first defendant had any right, title or interest; that after purchase of the properties in her name, she has been separately enjoying the same as her own properties; that item 18 of C Schedule was settled in her favour by her brother Tirupathi Reddiar, and its correct extent is 10.5 acres; that the house tax in respect of Door No.91-B has been assessed in her name; that it is her exclusive property; that the kist was also paid by her; that most of the purchases had been made by her long before the plaintiff was born; that she is not a benamidar; that the plaintiff and the 7th defendant had refused to allow her to enter into the house and prevented her from opening the iron safe; that they have no rights in her properties; that she is forced to reside at Mudakathan; that even assuming that she had no moneys of her own for purchase of the properties, the properties purchased in her name are to be treated to be the properties intended to be enjoyed absolutely by her; that she executed a Will on 17.6.81 bequeathing all her properties in favour of her grandson viz. defendants 5 and 6; that she purchased item 2 of C Schedule as early as 2.6.36; that she has been keeping her income separately; that she purchased 10 acres of land on 23.1.80 and also the house property shown as last item in B Schedule; that the house tax assessment stands in her name; that she sold a property purchased by her, to a third party Minor Raman as early as 16.3.1948; that the iron box belongs to her; that the plaintiff has no cause of action to file this suit; that the plaintiff is not entitled to get any relief, and hence, the suit may be dismissed with costs.

6. The 7th defendant filed a written statement stating that he along with the plaintiff and the defendants 1 and 3 are in joint possession of the suit properties; that the suit properties are ancestral properties; that the properties purchased in the name of the second defendant belonged to the joint family; that the income from the Mayittampatti Village properties have been handed over to the first defendant then and there after meeting the expenses by the plaintiff and the 7 th defendant; that he is entitled to 1/4th share in the deposited amounts and also 1/4th share in the loans advanced by the defendants; and hence, 1/4th share may be allotted to him.

7. In the written statement filed by the 8th defendant, it is averred that she is the daughter of the plaintiff; that the house at Post Office Street Virudhunagar had been purchased only for her benefit from the funds of her husband by way of a registered sale deed dated 16.7.81; that after her marriage, there was no need for the plaintiff or the defendants to look after her; that no property was purchased in her name from out of the joint family funds of the plaintiff and the other defendants, and hence, the suit has to be dismissed with exemplary costs.

8. It is averred in the written statement filed by the 9th defendant that he is the son of the plaintiff and a member of the joint family; that he purchased some properties from out of the funds of his mother; that his mother was having separate funds, and the same had been deposited in Indian Bank; that the plaintiff withdrew the said amount and spent the same for the purpose of the joint family; that he should be allotted with his share from the joint family properties in addition to the properties purchased by him; and hence, a preliminary decree for partition allotting his share has to be passed.

9. The 10th defendant filed a written statement stating that the defendants 10 and 11 are necessary parties to the suit; that they are entitled to a share in the joint family properties; that they adopt the written

statement of the 7th defendant; that the shares of the defendants 10 and 11 have to be allotted separately, and hence, a preliminary decree may be passed accordingly.

10. In the reply statement, the plaintiff has averred that the second defendant never intended to gift the said lands in favour of the fourth defendant; that C Schedule lands are also joint family properties; that the alleged settlement deed was not given effect to; that the 4th defendant was not given possession of the lands mentioned therein; that the fourth defendant filed a suit in O.S.778 of 1983 on the file of the District Munsif's Court, Tirumangalam against Nanammal, Ponnusamy Reddiar, Durairaj Reddiar, Gunapalan, Gandhiraj and Dinakaran for a permanent injunction restraining them from interfering with her alleged possession and enjoyment; that the said suit is still pending; that neither the plaintiff nor the 7th defendant is liable to render accounts for the profits; that the cancellation deed dated 4.3.8 3 as alleged by the 4th defendant is proper and legal; that since the suit properties are joint family properties, the plaintiff is entitled to partition.

11. In the additional written statement filed by the third defendant, it is stated that the first defendant even when he was alive, had disclaimed any interest in B Schedule item 2 and all the items in C Schedule; and hence, neither the plaintiff nor the defendants 3 and 7 can claim any interest in the said properties as his legal heirs.

12. The 4th defendant filed an additional written statement stating that the 2nd defendant had executed a registered settlement deed in her favour on 18.4.83; that the plaintiff or the 7th defendant has no right to claim any share in the properties; and that the alleged cancellation deed dated 4.3.83 is totally void and inoperative.

13. In the additional written statement filed by the defendants 5 and 6 it is averred that it is only with the evil intention of grabbing a share in the suit properties, the plaintiff has fraudulently included the properties in C Schedule as joint family properties; that the second defendant has expressly mentioned in her Will as to why she was not giving any portion of her properties to the plaintiff or 7th defendant and why she was bequeathing the same to them; that the second defendant executed a general power of attorney in favour of one Padmanabhan and instructed him to sell away her properties in Mudakathan and Anaiyur Village to them; that accordingly, the properties were sold to them on 18.5.83 and 30.5.83; and that they solely and exclusively entitled to the C Schedule house.

14. The case of the plaintiff in O.S.59/85 is as follows:
Originally the suit properties belonged to the first defendant. She executed a registered settlement deed in favour of the plaintiff on 18.4.83. She executed the same of her own accord and volition. As per the settlement, the plaintiff is entitled to the suit properties. The plaintiff is in possession and enjoyment of the suit properties from 18.4.83. At the instance of the defendants 2 to 6, on 4.6.83, the first defendant was made to cancel the settlement deed; that she has no right to cancel the settlement; that she has done so on account of coercion and undue influence of the defendants 2 to 6; that when the plaintiff and her men were about to plough the suit properties on 8.8.83, the defendants came there, threatened and wanted to oust the plaintiff from her possession of the suit properties; and hence, the plaintiff was constrained to file this suit, and the defendants should be

restrained by way of permanent injunction.
15. The first defendant filed a written statement alleging that the plaintiff is not in possession and enjoyment of the suit properties at any point of time; that the suit properties are joint family properties belonging to her husband and his three sons; that the suit properties have been purchased in her name from out of joint family nucleus by her husband; that the settlement deed was executed by her at the instance of her father; that she executed a power of attorney in favour of the husband of the plaintiff, who had misused the same and the same has resulted in the execution of the said settlement deed; that the other defendants were not aware of the said settlement; that the husband of the plaintiff and her father filed O.S.29/83 on the file of the Vacation Civil Judge, Madurai on 19.5.83 in her name for a permanent injunction, and the said suit was transferred to the District Munsif, Madurai and numbered as O.S.263/83; that on coming to know about the evil design and also misuse of the power, an application was filed in I.A.431/83 to strike off her name from the array of parties as first plaintiff and to dismiss the suit, and the same was allowed on 21.6.83; that the recital in the settlemen t deed were executed and introduced only for the sake of the settlement deed and not with the idea of giving effect to the same; that the settlement deed was not acted upon; that the suit properties are in possession and enjoyment of the defendants 2 and 3; that the settlement deed seems to have been obtained from her by giving false hope and with ulterior object of defrauding the rights of the defendants 2 and 3; that the settlement deed was duly cancelled by her by means of a registered cancellation deed dated 4.6.83; that she was never kidnap ped by the defendants 2 and 3; that the cancellation deed is a free and voluntary document; that she did not give any threat on 8.8.83; that various crops were raised in the suit properties; that the plaintiff has no cause of action against the defendants, and hence, the suit may be dismissed with costs.
16. The 2nd defendant filed a written statement with the following averments:
The suit properties are joint family properties. Since the suit properties stand in his mother's name, it has been stated in the settlement deed that the suit properties are the self acquired properties of the first defendant. The settlement deed was executed at the instance of his youngest brother Ramraj and the husband of the plaintiff. The husband of the plaintiff had misused the power deed executed by the first defendant and filed a suit for permanent injunction. He also filed a suit for partition of the joint family properties. The said settlement deed was not acted upon. The plaintiff had never taken possession either actual or constructive of the suit properties at any point of time. The cancellation deed dated 4.6.83 is a free and voluntary document executed by the first defendant. There was no necessity for him to make any such threat. The suit properties are in exclusive possession and enjoyment of the defendants 2 and 3. The suit is frivolous and vexatious. The plaintiff is not entitled to any relief as claimed in the plaint.
17. The second defendant has filed additional written statement alleging that the plaintiff is not entitled to the alternate relief prayed for possession; that the plaintiff has no title to the suit properties; that the plaintiff is also not entitled to any mesne profits; that the properties have been valued at Rs.40000/- in the alleged settlement itself and that not less

than Rs.100/- is paid towards kist.
18. Both the appeals have been preferred from a common judgment and decree of the learned Subordinate Judge in the above two suits, one for partition and the other for permanent injunction.
19. For the sake of convenience, the parties will hereinafter be referred to as arrayed in O.S.363/81 viz. plaintiff and defendants.
20. The learned Counsel appearing for the appellants would submit that the judgment and decree of the lower Court are not sustainable in law; that in the instant case, though the burden is on the plaintiff to prove the case, he miserably failed to do so; that the lower court while dealing with issues 1, 2, 9 and 10, has dealt with the case as if the defendants 3 to 6 claiming under the 2nd defendant, have failed to prove that the said properties were purchased by the second defendant from and out of her funds and not out of the income from the joint family properties; that the lower court has completely ignored even the fundamental position of Hindu Law that in the case of a coparcener purchasing a property in his own name while remaining joint with the other members of the family, it is for the other members to prove affirmatively that the joint family is possessed of sufficient means and nucleus to aid the said acquisition and only if they succeed in doing so, the onus shifts to the acquirer to prove that the property in question was acquired by him without any aid from the family properties; that the lower court has overlooked the fact that at the time of filing the written statement, defendants 4 to 6 have not acquired the properties standing in the name of the 2nd defendant, and it was not to their interest to plead any false case; that the lower court should have found that the first and second defendants were forcibly kidnapped by the plaintiff and the defendants 7 and 9 to 11 and was kept as a prisoner in their custody; that she has been forced to depose in court as D.W.2 contrary to her own pleadings in her written statement; and that the registration copy of the Will had been marked as Ex.B.422 and the lower court has completely ignored the said document which completely cuts at the plaintiff's case of Benami purchase and also proves that the second defendant has given perjured testimony in court as D.W.1 only on the compulsion of the plaintiff and defendants 7 and 9 to 11.
21. The learned counsel for the appellants has further contended that the lower court should have given the greatest weight for the pleas made in the written statement of the first defendant since it was against her own interest and was not in any way actuated by any animosity towards plaintiff or seventh defendant and their sons; that the observation of the lower court that the said case is not believable since the second defendant has not executed any power in his favour is absolutely meaningless; that in respect of C schedule lands in the villages of Maiyittanpatti, Chittor, and Nallanayankanpatty, kists have been paid only by the second defendant, and they all have been produced into court by the fourth defendant, who is the settlees from the second defendant; that the plaintiff has produced the subsequent kist receipts only for faslis 1394 (1984-85) and subsequent thereto which are marked as Exs.A.6 to A.16 after the second defendant was kidnapped and kept in the illegal custody of the plaintiff in May 1983; that the lower court should have found that the plaintiff has miserably failed in proving that the family had sufficient income to make the said purchase benami in the name of the defendant; that the other motives sought to be put forward in the course of evidence that Balu Reddiar brother of the first defendant was a

court bird and he could make a claim if they are purchased in the name of the first defendant and hence, purchases were made benami in the name of the 2nd defendant, have not been pleaded in the plaint or in the reply statement; that the lower court should have rejected the said motive; that so far as the Mudakathan house and lands are concerned viz. B schedule item 4 and C schedule last item, the original sale deeds relating to them namely Exs.B.1 and B.2 are produced in Court only by 2nd defendant; that on the other hand the plaintiff has not produced any bills, vouchers or any document to prove that was spent for the construction of the house by the joint family and no independent witnesses have been examined to prove that the house was constructed by plaintiff; that the lower court has failed to see that the plaintiff performed his daughter's marriage in his mother's house describing it as his house, that cannot be a ground to hold that the house belongs to the plaintiff; that it has to be noted that the explanation of D3 as D.W.4 was not considered by the trial Court; that if the properties were joint family properties, then the pattas should have been transferred in the name of the plaintiff, as he was managing the same; that Ex.B45 settlement deed is true and valid and binding on the plaintiff; that it is pertinent to note that the execution of the settlement deed has been admitted by the second defendant in her written statement in O.S.59/85; that the recitals in Ex.B397 would prove that the property comprised in the settlement deed are all self acquired and absolute properties of the second defendant; that it is pertinent to note that Ex.B45 has been acted upon; that the plaintiff has no right to attack the settlement deed, since the properties therein are not joint family properties; that the plaintiff has also no right to attack Exs.B393 to B396 sale deeds executed by the second defendant's power agent Padmanabhan; that the plaintiff as third party to those sale deeds is not entitled to question the consideration thereunder; that the judgment and decree of the lower Court in O.S.59/85 has got to be set aside and and the suit be decreed; and that the finding of the lower Court in O.S.363/81 in respect of items 3 and 4 of B Schedule and all the items in C Schedule has got to be set aside and the suit in that respect be dismissed. In support of his contention, the learned Counsel for the appellants cited the following decisions:- 1) 1975 (2) MLJ 184; 2) 1970 (1) MLJ 105; 3) AIR 1965 SC 271; 4) AIR 1966 SC 605; 5) AIR 1977 SC 40 9; 6) AIR 1980 SC 727; 7) AIR 1977 SC 2230 and 8) AIR 1995 MADRAS 415 .

22. The learned Counsel for the contesting respondents would submit that the lower Court was perfectly correct in dismissing the suit filed by the fourth defendant and in granting a preliminary decree in favour of the plaintiff; that the suit properties are ancestral properties; that 'B' Schedule immovable properties were purchased in the name of the first defendant, while 'C' Schedule properties were purchased in the name of the second defendant, both from and out of the income from the ancestral nucleus and also from the joint efforts of the plaintiffs and the defendants 1, 3 and 7; that both 'B' and 'C' Schedule properties belonged to the joint family; that the fourth defendant is not entitled to the properties in pursuance of the alleged settlement deed; that the alleged settlement deed was not given effect to; that the fourth defendant was not given possession of the lands mentioned in the alleged settlement deed; that the said settlement deed was executed by the second defendant at the instance of the third defendant and the husband of the fourth defendant; that neither the plaintiff nor the 7th defendant is liable to render accounts for the profits; that it is pertinent

to note that the cancellation deed dated 4.3.1983 is proper and legal; that the power of attorney executed by the second defendant in favour of the husband of the fourth defendant was misused by the fourth defendant and four sale deeds in respect of the properties in Mudukathan Village were fraudulently brought into existence; that the said cancellation deed was executed by the second defendant out of free will and volition; that the lower Court only after careful consideration of the evidence both oral and documentary has granted a preliminary decree in favour of the plaintiff, and in view of the available evidence, there is nothing to interfere in the said finding; and hence, both the appeals have got to be dismissed. In support of his contentions, the learned Counsel relied on the decisions reported in 1) 1979 (4) SCC 790; 2) AIR 1974 SC 471; 3) 1977 (1) SCC 60 and 4) 1975 (2) MLJ 73.

23. The appellants in A.S.1122/86 who are the defendants 3 to 6 in a suit in O.S.363/81 for partition, have brought forth this appeal challenging that part of the judgment wherein the lower Court recorded a finding that items 3 and 4 of 'B' Schedule and 'C' Schedule immovable properties belonged to the joint family, and the plaintiff was entitled to 5/16 share in that properties also.

24. The relationship of the parties as set out in Ex.A1 Genealogy is admitted. It is admitted by the parties that the first defendant and his brother entered into an oral partition in respect of the family properties in 1934, and about 11 acres of punja lands and 2 ¬ acres of nanja lands were allotted to the share of the first defendant. The family consisting of the first defendant and his children continued to be joint till the time of the instant suit for partition. Claiming 5/16th share in all the plaint Schedule properties, the first respondent/plaintiff has averred that the properties described in 'B' Schedule were purchased in the name of the first defendant from and out of the income from the ancestral properties and from the income derived of the joint efforts of the plaintiff, and the properties described in 'C' Schedule were purchased in the name of the second defendant from and out of the income from the ancestral nucleus and from the joint efforts of the plaintiff and defendants 1, 3 and 7; that the second defendant was only a benami, and the properties actually belonged to the joint family. While admitting that 'A' Schedule properties belonged to the joint family and are available for partition, the appellants/defendants 3 to 6 resisted the suit stating that items 3 and 4 in 'B' Schedule were exclusive properties of the first defendant; that the properties described in 'C' Schedule were acquired by the second defendant from and out of her Sreedhana properties; that she was having money lending transaction from the time of her marriage, and thus, those properties were not partible, nor could the plaintiff claim any share in those properties. Thus, the appeal in A.S.1122/86 centres round the prime question whether those properties belonged to the joint family as contended by the first respondent/plaintiff or they were self acquisitions as contended by the appellants-defendants 3 to 6 .

25. The plaintiff has examined himself as P.W.1. In his evidence, he has stated that all the properties found in the Schedules including items 3 and 4 in 'B' Schedule and all the properties in 'C' Schedule belonged to the joint family, though they were purchased in the name of the second defendant. Contrary to the above, the third defendant examined himself as D.W.4 has deposed that those properties were self acquisitions of their mother, the

second defendant from and out of the income that she derived from the money lending business.

26. The appellants have admitted that the immovable properties found in 'A' Schedule and items 1 and 2 in 'B' Schedule belonged to the joint family. P.W.1 has deposed that though the sale deeds stood in the name of the second defendant, the said items of properties were purchased from and out of the income derived from the joint family properties. It is not the case of the appellants/defendants 3 to 6 that the landed properties which were allotted to the share of the first defendant were not revenue yielding. A scrutiny of the documentary evidence would reveal that the items 3 and 4 in 'B' Schedule and all the items in 'C' Schedule were purchased under Exs.A5, B1, B23 to B31, B33 to B41; and that the first sale in favour of the second defendant had taken place on 2.6.1936 under Ex.B24, and all the sale deeds in respect of the purchase of different items of properties found in the Schedules have followed, and the last two sale deeds executed in favour of the second defendant on 23.1.1960 and 14.6.1960 were marked as Exs.B1 and B2 respectively. It is pertinent to note that the sale consideration under all the above sale deeds except Exs.B1 and B2, were only small and meagre.

27. The recitals found under Exs.B24, B25, B27, B30 and B34 would reveal that the first defendant has paid the consideration on behalf of the second defendant. The stamp papers for Ex.B36 sale deed were purchased in the name of the first defendant. Under Ex.B40 sale deed, the seventh defendant has paid the consideration on behalf of the second defendant. Ex.A17 mortgage deed dated 19.9.1952 also contains a recital that the consideration was paid by the seventh defendant. A house site was conveyed to the second defendant under Ex.A5 sale deed dated 26.11.1936 for a consideration of Rs.200/-, which was paid by the first defendant on behalf of the second defendant. The second item of 'C' Schedule with an extent of 10 acres was purchased on 23.1.19 60 under Ex.B1 for a consideration of Rs.20,000/-. P.W.1 has stated that the first defendant had moneys in his Bank account, out of which Rs.8,000/- was taken on 25.1.1960 as evidenced by Ex.A2, and the same was utilised along with the family funds for the purchase of the said properties. The recitals found in all the above sale deeds would be indicative of the fact that the sale consideration has proceeded from the first defendant or was paid by the seventh defendant and not from the second defendant. The contention of the appellants' side that the second defendant was a womenfolk of olden days, and hence, she did not go to the Sub Registrar's Office, and only under such circumstances, the first defendant or the seventh defendant has made the payment on behalf of the second defendant cannot be countenanced.

28. The properties are situate at Maiyittampatty and Madukathan Villages. It is not in dispute that the second defendant was living with her husband at both the places. It is contended by the third defendant that he was managing the immovable properties covered under Exs. B1 and B2 on behalf of the second defendant. The third defendant has no explanation to offer as to under what circumstances, the patta was issued in his favour for five acres and another patta in the name of the second defendant for five acres, while the total extent of 10 acres stood in the name of the second defendant. It is admitted by the third defendant that he was looking after the agricultural operations in the landed properties situate at Madukathan Village. The non maintenance of separate accounts by the second defendant in respect of the agricultural income would also indicate that those properties were never

treated as the separate properties of the second defendant. From the evidence of the third defendant, it would be clear that he was maintaining the accounts in respect of the agricultural income derived from the lands situate at one place, while the plaintiff and the seventh defendant were maintaining the accounts in respect of the lands situate in the other Village. All the above would clearly indicate that though the landed properties stood in the name of the second defendant, they were treated only as the joint family properties.

29. According to P.W.1, his paternal uncle convened a panchayat and demanded a partition in respect of the immovable properties available in the hands of the first defendant's family subsequent to the oral partition that took place in the year 1934, and in the said panchayat, it was decided that those properties were acquired by the family members of the first defendant from and out of their own exertion, and hence, those properties could not be divided. Not even a suggestion was put to P.W.1, denying the said panchayat or the decision arrived thereon. This assertion of P.W.1 as to the f act of panchayat is fully corroborated by the evidence of the defendants 2 and 7. According to the said witnesses, the properties were purchased in the name of the second defendant only in anticipation of any claim that might be made by the paternal uncle of the plaintiff. On the other hand, the prime defence that was raised by the appellants/defendants 3 to 6 that those properties were acquired by the second defendant from and out of her sreedhana properties and also out of the income which she earned through money lending transactions from 1929 onwards cannot be countenanced for more reasons than one. No material is available or placed before the Court to show that she had any money lending transaction from 1929. The second defendant examined as D.W.1 has categorically admitted that she had no money lending transactions at all. P.Ws.2 and 3, two aged villagers, who were acquainted with the family, have categorically deposed that she had no money lending business. The defendants 3 and 4 were not competent to speak about the alleged money lending business of the second defendant, in view of their age during the relevant period. The third defendant has categorically admitted that he did not know anything about the said money lending business, and no accounts were maintained for the same. The second defendant has flatly denied the payment of any money or gift of jewels at the time of her marriage. A reading of the evidence of the third defendant would clearly reveal that he was neither competent nor had any knowledge as to the acquisition of the properties under the sale deeds, which stood in the name of the second defendant. In short, it can be stated that no proof is available to show or even infer that the second defendant was in possession of funds or any money lending business yielding income to purchase the properties in question. That apart, taking into consideration the age of the plaintiff and his brothers viz. defendants 3 and 7 at the time of the said acquisitions, they could not be competent to speak about the source from which the considerations were paid. The first defendant father and the second defendant mother were the only competent witnesses to speak about those facts effectively. Pending the suit, the first defendant died on 29.3.84 . Thus, the only witness, who could well speak about the acquisitions made under those documents, was the second defendant alone.

30. It is true that the second defendant originally filed a written statement stating that the above items of properties were her self acquisitions, and they were not joint family properties. During the pendency of the suit, she filed I.A.No.185/84 seeking amendment of the earlier written

statement. On service of a copy of the said application and affidavit, the third defendant has also filed I.A.No.201/94 seeking permission of the Court to file additional written statement. However, both the applications were not entertained. The second defendant was examined as D.W.1. She has categorically admitted that the two items of properties in 'B' Schedule and all the items of properties in 'C' Schedule were purchased by and from out of the income of the joint family in her name; and that she was not possessed of funds, nor was she given any Sreedhana from her parental home to make the said acquisitions. Thus, by those admissions she has not only given up her case pleaded in the written statement, but also has admitted the case of the plaintiff that all the properties belonged to the joint family. The learned Counsel appearing for the appellants with vigour and vehemence would contend that her evidence has got to be brushed aside, since she has deviated from her plea in the written statement and has deposed contra to the averments therein; that due to compelled circumstances and threat, she crossed to the side of the plaintiff at the time of trial, and hence, her evidence should not be given any credence, and the averments in her written statement would hold good and should be taken into consideration. The court is afraid whether it could accept such a plea, since it cannot stand the scrutiny of law. True it is, she filed a written statement originally stating that the properties were self acquisitions and were not joint family properties. She could well exercise her right either to give evidence in the line of the written statement or to give up her plea therein. If the contention of the learned Counsel for the appellants has got to be accepted, any party, who gets into the box, cannot depose according to his/her wish, will and conscience, and the freedom of the witness would be jeopardised.

31. It is contended by the learned Counsel for the appellants that the admissions made by the second defendant in her evidence were brought about by threat and compulsion exercised over her at the time of trial and were not made out of her free will. Admittedly, the second defendant was an illiterate, and she was 83 years old at the time when she was examined in Court, and she was suffering from lack of vision and hearing for number of years. She had no bank accounts of her own. She has categorically deposed that she did not know even the name of her Advocate, and she signed in all the papers pertaining to the case in the house of the third defendant, and she was kept in confinement by the third defendant at different places. All the above would clearly reveal that the original written statement by the second defendant was an outcome of the prominent role played by the third defendant to suit his defence. From the available evidence, it is clear that the aged second defendant was in the custody of the third defendant at the time of filing of the original written statement and was also in the custody of the plaintiff at the time when she filed the interlocutory application for reception of the additional written statement. This would show that the parties have taken advantage of the situation and pressed her into service to suit their case. It is significant to note that she has expressed her desire that the properties should be equally shared by her sons, which would indicate that she had distributed her affection equally among all her sons. The appellants are unable to adduce any reason why she should come forward to depose that the properties were not her self acquisitions, but were purchased from and out of the joint family funds.

32. In the instant case, though the second defendant has claimed the

above items of properties as her self acquisitions, she has adduced evidence as a defence witness that those properties were not acquired by her out of her income. Not only she has stopped with it, but also has made a candid admission that these properties were purchased by and belonging to the joint family. Significant it is to note that these appellants are not claiming any right, title or interest to the above properties independently, but only through their mother, the second defendant. While so, they cannot put forth a better claim than the second defendant had in the properties. While the second defendant herself has admitted that she has no right in the properties, the appellants who claim through her, cannot be permitted to say that they could claim any interest over the same, since they cannot claim more royal than the King. In the instant case, D.W.1 was cross examined in full length by the appellants. S.58 of the Evidence Act reads:

"58. Facts admitted need not be proved:- No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

33. The Apex Court had an occasion to consider the effect of admission made by a party in evidence in UNION OF INDIA V. MOKSH BUILDERS AND FINANCIERS LTD. AND OTHERS (AIR 1977 SUPREME COURT 409). It has been held in the said decision thus:

"An admission by a party is substantive evidence of the fact admitted, and admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions."

34. It remains to be stated that the fourth defendant filed a suit in O.S.No.59/85 for recovery of possession against the second defendant and others in respect of the properties alleged to have been settled in her favour by the second defendant under Ex.B45 settlement deed dated 18.4.1983, and the said suit was also tried along with the instant suit. In the said suit, the second defendant has filed a detailed written statement stating that the properties covered under the settlement deed belonged to the joint family and not her self acquisitions, and thus, she was not competent to execute a settlement deed as found under Ex.B45. Under the aforestated situation, the admissions made by the second defendant in her evidence as D.W.1 can be taken as a substantive piece of evidence to the fact that the above mentioned properties in respect of which now the appellants have brought forth the appeal in A.S.1122/86, belonged to the joi nt family and not her acquisitions.

35. The contention of the plaintiff that the properties covered under the above sale deeds were purchased in the name of the second defendant benami has got to be accepted, in view of the admissions made by the second defendant. The third defendant has categorically admitted that items 1 and 2 of 'B' Schedule were purchased from the income of 'A' Schedule properties, and 'D' Schedule properties were purchased in the name of his brother from out of the income of the joint family. This would indicate that it was a practice followed in the family to purchase properties in the names of the members of the family from and out of the income of the joint family. In the above cited

decision reported in AIR 1977 SUPREME COURT 409, the Apex Court has held as follows:

"The burden of proof is, however not static, and may shift during the course of the evidence. Thus while the burden initially rests on the party who would fail if no evidence is led at all, after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence were adduced by either side i.e. on the evidence on record. Where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place, and the truth or otherwise of the case must always be adjudged on the evidence led by the parties. This will be so if the court finds that there is no difficulty in arriving at a definite conclusion. In the present case, the purchase of a house was held to be "benami"."

36. As rightly contended by the learned Counsel for the appellants, a duty is cast upon the plaintiff demanding partition to plead and prove satisfactorily that the joint family had nucleus, wherefrom there was sufficient flow of income, with which the properties in question were acquired. In the instant case, it cannot be stated that there was lack of requisite pleading. On the other hand, the plaintiff has placed necessary averments in the plaint. He has discharged his burden that the joint family owned 11 acres of punja lands and 2 ¬ acres of nanja lands, which were revenue yielding. The members of the family who continued to be joint, have physically contributed, which resulted in the revenue derived therefrom. All the above would lead to the irresistible and inescapable conclusion that items 3 and 4 in 'B' Schedule and all the items in 'C' Schedule were purchased in the name of the second defendant benami, but from and out of the joint family funds; and that they were treated as joint family properties all along. Therefore, the lower Court was perfectly correct in grating a preliminary decree in favour of the first respondent-plaintiff, and there is nothing to interfere in that part of the judgment and decree of the Court below.

37. Assailing the judgment of the Court below in respect of the finding that Ex.B45 settlement deed executed by the second defendant in favour of the fourth defendant was null and void, the learned Counsel for the appellant-fourth defendant would submit that the lower Court went wrong in observing that the second defendant was not competent to execute the settlement deed, since the properties belonged to the joint family and were not her self acquisitions, and apart from that, the said settlement was also not acted upon; that the second defendant owned all the properties stated in the settlement deed; that the second defendant has executed all the documents because of love and affection for the fourth defendant; that the said settlement was a revocable one; that in view of the fact that possession was handed over to the fourth defendant, the said settlement has been acted upon; and that the fourth defendant has adduced sufficient documentary evidence for payment of kist by the fourth defendant subsequent to the settlement. Relying on a decision of the Division Bench of this Court reported in AIR 1995 MADRAS 415 (KAMAKSHI AMMAL V. RAJALAKSHMI AND OTHERS), the learned Counsel for the appellant would submit that handing over of possession is not necessary; and that there was acceptance of the gift in question, and the deed of revocation executed by the second defendant under Ex.B397 was invalid, since the same was brought about by the plaintiff to make illegal gain out of it and to defeat the rights of the fourth defendant, and apart from that, the said settlement

deed was revocable. After careful consideration of the rival submissions, the Court is of the view that the settlement deed executed by the second defendant in favour of the fourth defendant, as found under Ex.B45 is invalid for the simple reason that the second defendant has no right to bequeath the joint family properties found therein. The fourth defendant has filed the suit in O.S.59/85 basing her cause of action on the settlement deed executed by the second defendant in her favour. That apart, the said bequeath is hit by the Doctrine of Lis Pendens. The instant suit for partition was filed in the year 1981, while Ex.B45 settlement deed was executed on 18.4.1983. Thus, without any hesitation, the said settlement deed can be declared as null and void. Hence, the fourth defendant cannot claim any right under the settlement. Therefore, it has to be held that the fourth defendant is not entitled either for recovery of possession or for permanent injunction. The lower Court was right in dismissing the suit filed by her.

38. In the result, both the appeal suits are dismissed, leaving the parties to bear their costs.

Index: Yes
Internet: Yes

To:
1. The II Additional Subordinate Judge,
Madurai (with records).

2. The Record Keeper,
V.R.Section,
High Court, Madras.